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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUL - 8 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Part 1 of the
Commission's Rules -- Competitive Bidding
Proceeding;

Comment Requested on 7 Percent Interest Rate
Imposed on C Block Installment Payment Plan
Notes; Waivers Requested by Broadband PCS C
and F Block Licensees

WT Docket No. 97-82

Public Notice DA 97-1152

**JOINT REPLY COMMENTS OF SPRINT SPECTRUM L.P. d/b/a SPRINT PCS,
SPRINT CORPORATION, AND COX ENTERPRISES, INC.**

For Sprint Spectrum L.P. d/b/a Sprint PCS

Jonathan M. Chambers
1801 K Street, N.W.
Suite M-112
Washington, D.C. 20006
(202) 835-3617

Cheryl A. Tritt
James A. Casey
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

For Sprint Corporation

Jay C. Keithley
1850 M Street, N.W.
Suite 1100
Washington, D.C. 20036
(202) 828-7453

Counsel for Sprint Spectrum L.P. d/b/a
Sprint PCS

For Cox Enterprises, Inc.

Alexandra M. Wilson
Cox Enterprises, Inc.
1320 19th Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 296-4933

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Pursuant to Public Notices DA 97-679¹ and DA 97-1152² released by the Federal Communications Commission ("FCC" or "Commission") on June 2, 1997, Sprint Spectrum L.P., d/b/a Sprint PCS ("Sprint PCS"), Sprint Corporation ("Sprint"),³ and Cox Enterprises, Inc. ("Cox")⁴ (collectively "Sprint PCS"), submit the following reply to comments

¹ FCC Public Notice, Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues, DA No. 97-679 (June 2, 1997) ("*Installment Payment Issues Public Notice*").

² FCC Public Notice, Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes; Waivers Requested by Broadband PCS C Block Licensees, DA No. 97-1152 (June 2, 1997).

³ Sprint Corporation holds a 40% general and limited partnership interest in Sprint Spectrum, L.P. which holds 30 A and B Block Personal Communications Service ("PCS") licenses. In addition, Sprint holds 160 D and E Block licenses through its wholly-owned subsidiary SprintCom, Inc.

⁴ Cox is the majority shareholder of Cox Communications, Inc., a publicly-traded company. Cox Communications, Inc. holds a 51 percent interest in Cox Communications PCS, L.P., a partnership formed to hold the A Block PCS license for the Los Angeles-San Diego MTA. Another Cox Communications, Inc. subsidiary, Cox Telephony Partnership, holds a 15 percent limited and general partnership interest in Sprint PCS. Cox did not file initial comments in this proceeding.

addressing the C and F Block debt restructuring and financing relief proposals submitted by a number of industry participants, including C Block PCS licensees.

I. INTRODUCTION & SUMMARY

In their separately filed comments in this proceeding, Sprint and Sprint PCS argued that the Commission will disserve the public interest if it provides *ad hoc* financing and debt relief to certain C and F Block licensees or makes wholesale modifications to its regulatory treatment of C Block licensees in order to bolster artificially the financial positions of a handful of these companies that exhibited imprudent bidding strategies.⁵ Many other commenters in this proceeding, including C and F Block licensees, agree with Sprint PCS that a post auction restructuring of the C and F Block debt is fundamentally unfair to those entities that relied on Commission rules and policies and ultimately will undermine the certainty and integrity of the Commission's auction process.⁶

II. C BLOCK LICENSEES PROVIDE NO PERSUASIVE JUSTIFICATION FOR GRANT OF THE RELIEF SOUGHT

The majority of commenters favoring a change in Commission auction rules and policies assert that drastically changed circumstances in the capital market require that the Commission provide substantial relief from their financial obligations to the federal government so that they can obtain sufficient financing to build and operate their systems.⁷ The primary explanation for these changes, when one is offered at all, is that the delays in auctioning and licensing of the C and F Blocks has caused these companies to miss a

⁵ See Sprint Comments; Sprint PCS Comments.

⁶ See *e.g.*, Comcast Comments at 3-4; Cook Inlet Comments at 3, 15; Conestoga Wireless Comments at 1-3; Nextel Comments at 8-11.

⁷ See *e.g.*, Fortunate Comments at 2; GWI Comments at 2-3; Chase Telecommunications Comments at 1; Urban Communications at 4-5; NextWave Comments at 11-13; Eldorado Comments at 1-2; Horizon Comments at 2; PCS Plus Comments at 2-3.

financing window because the financial markets no longer value wireless licenses as highly as they did prior to and during the C Block auction. These commenters fail to consider, however, the reason for the hesitancy of lenders to finance C Block licensees, namely, their own flawed assumptions regarding license valuation and capital availability, and their own bidding excesses.⁸ The hesitancy of lenders to loan money to companies whose debt load exceeds the value of their assets (the licenses) is understandable.⁹ The commenters' difficulties, however, are the result of their own imprudent actions, not the Commission's rules. Some commenters advocate discounting C Block bids to the average A/B Block bids, "which would reflect the fair market value for C Block licenses."¹⁰ It hardly seems necessary to point out that the C Block bidders were fully aware of the "fair market value" of the A and B Block licenses at the time of the C Block auction. The availability of capital is a critical matter that each of these companies should have considered *prior to and during* the C and F Block auctions. The Commission must not bail out bidders who ignored the realities of the market and their own competitive and capital position.¹¹

The assertion that delays in the licensing and auctioning of C and F Block licenses are the cause of the petitioners' lack of capital rings hollow. The effect of any competitive

⁸ See BIA Capital Corp. Comments at 1; Toronto Dominion Comments at 1; Nextel Comments at 15; Comcast Comments at 3; Comments at the Commission July 1, 1997 Forum on C and F Block Debt Restructuring (the "Forum").

⁹ See e.g., Toronto Dominion Comments at 1-2; BIA Capital Corp. Comments at 1.

¹⁰ GWI Comments at 1.

¹¹ As Comcast Corporation points out

If the Commission is truly committed to [market-based mechanisms] for the award of PCS and other licenses, it must accept the consequences of marketplace developments, positive and negative. The discipline of free markets dictates that if a party makes a bad economic decision, its financial performance suffers relative to its competition, and if the decision is bad enough, the enterprise will fail.

Comcast Comments at 3.

delay should have been factored into the bidders' business plans and bidding strategies so that the price paid for a license would reflect all "time-to-market" disadvantages.¹² Moreover, many other C and F Block licensees have obtained sufficient capital to acquire their licenses and begin construction of their systems,¹³ demonstrating that any effects of delay are overstated. These companies wisely modified their business plans and scaled back their bidding, where necessary, once they determined that their original strategy would likely exceed their financial capability.¹⁴ Thus, C and F Block licensees that bid prudently and have solid business plans have located sufficient capital despite any perceived downturn in capital markets.¹⁵ Moreover, some economic indicators suggest that the telecommunications capital market is healthy.¹⁶ Simply put, financing is available for those

¹² The incumbent cellular licensees had a ten year headstart on the A and B Block PCS bidders, yet capital has been available to them.

¹³ See e.g., Comscape Comments at 1-2; Horizon Comments at 2; DigiPH Comments at 1-2; Airadigm Comments at 1-2.

¹⁴ See e.g., DigiPH Comments at 2; Horizon Comments at 2; Comscape Comments at 2; Conestoga Wireless Comments at 2.

¹⁵ The comments of the Small Business Coalition ("SBC"), representing C and F Block licensees potentially serving 15.5 million people across the United States, SBC Comments at 2, attest to this fact. The SBC notes that:

Coalition members . . . developed prudent business plans designed to accomplish their respective goals. These plans incorporated expected capital costs as well as anticipated market conditions. *As a result, Coalition members are well prepared to meet their debt-service obligations and do not face the "crisis" that is suggested to be hovering on the horizon of PCS licensees.*

SBC Comments at 5 (emphasis added).

¹⁶ *Wireless Stocks Start To Climb Charts*, RCR, June 30, 1997, at 1. ("An increasing number of telecom companies have seen meteoric increases in the price of their stock in recent days. As of June 25, 28 RCR [stock] index companies were trading within 10 percent of 52-week highs while only five were hovering within 10 percent of 52-week lows.").

companies that properly analyzed their competitive and financial situation and bid accordingly.

Many commenters also argue that the requested bail-out sought by the petitioners is Congressionally mandated.¹⁷ They are wrong. Section 309(j) of the Communications Act of 1934, as amended (the "Act"), simply requires the Commission to design its competitive bidding systems to provide "economic opportunities" for small and minority and women owned businesses. The Act does not require the Commission to ensure the financial success of these companies, nor has the Commission ever assumed that role.¹⁸ Moreover, the Commission has more than satisfied the Act's mandate by establishing set aside spectrum for designated entities, bidding credits, and an exceedingly flexible installment payment program. These actions have resulted in almost 1000 PCS licenses being awarded to qualifying small businesses. The Commission has no further obligation to modify its regulations post auction to ensure insolvent or financially strapped licensees continued financial viability.

The hard fact is that the Entrepreneurs Block licensees in financial straits have caused their own problems. That some bidders did not heed the true market value of the licenses during the bidding process and greatly overextended their financial means does not justify drastic alteration of the PCS and CMRS competitive playing field. Such action not only belies the entire concept of an auction, but unfairly punishes those who followed the Commission's rules and practiced responsible business judgment.

¹⁷ See e.g., Fortunet Comments at 2-3; NextWave Comments at 11; Indus, Inc. Comments at 6; Urban Communicators Comments at 2; GWI Comments at 5.

¹⁸ As a recent Wireless Telecommunications Bureau Chief stated, "[a]uctions are a market oriented process . . . [w]e offer no guarantee of success, only the opportunity to compete." FCC News Release, Statement of Michele C. Farquhar, Chief, Wireless Telecommunications Bureau (May 17, 1996).

III. FEDERAL LAW BARS A COMMISSION GRANT OF THE REQUESTED RELIEF

Some commenters argue that federal law prohibits Commission grant of much of the relief requested. Specifically, they note that no federal agency may compromise a debt owed the federal government without first attempting to collect the full debt and then can proceed only subject to Department of Justice approval. They also argue that the relief sought constitutes a request for retroactive rulemaking.

A. The Commission May Not Reduce The Value of The C Block Debt To The Federal Government

Sprint PCS agrees with those commenters that argue that the *Debt Collection Improvement Act of 1996* (“the “Debt Act”) bars the Commission from compromising a debt over \$100,000 owed to the federal government.¹⁹ Specifically, the Debt Act prohibits any agency, including the Commission, from reducing the value of a debt owed the federal government, absent Congressional or Department of Justice authorization, if such debt exceeds \$100,000 excluding interest.²⁰ In addition, the Commission must attempt to collect the full debt prior to any efforts to compromise a claim.²¹ Regulations implementing the Debt Act grant exclusive jurisdiction over the compromise of claims in excess of \$20,000 to the Department of Justice.²² Thus, Congress explicitly limited the authority of a federal agency such as the Commission to compromise debt owed to the federal government. Grant of the proposed relief would exceed such authority and is, therefore, prohibited absent Department of Justice approval.²³

¹⁹ BellSouth Comments at 10; Cook Inlet Comments at 28.

²⁰ 31 U.S.C. § 3711(a).

²¹ *Id.*

²² See 4 C.F.R. § 103.1; 47 C.F.R. § 1.1915.

²³ 47 C.F.R Part 103.

B. The Commission May Not Engage In Retroactive Rulemaking

As BellSouth also points out, the Commission may not engage in retroactive rulemaking without express statutory authorization.²⁴ The petitioners' proposals effectively seek such rulemaking by requesting the entire set of rules governing the Entrepreneurs Block auction not be applied, or be applied in a modified manner, in order to relieve the participants from willingly assumed obligations. Such fundamental changes in the premises underlying the auction process completely alter the status of the participants in the auction, and certainly would have altered the bidding as well as bidder eligibility. Thus, under settled federal case law, the Commission may not grant the relief requested because to do so would constitute unlawful retroactive rulemaking.²⁵

IV. MANY COMMENTERS AGREE THAT POST AUCTION MODIFICATION OF THE PCS ENTREPRENEURS BLOCK RULES AND POLICIES WOULD DESTROY THE INTEGRITY OF THE COMMISSION'S AUCTION POLICIES AND PROCEDURES

As numerous commenters, including C and F block licensees, agree,²⁶ "[c]hanging the basic economic terms on which an auction was conducted after the close of the auction - particularly the obligation of the winning bidders to pay the net price in accordance with the established terms -- destroys the integrity of this and future auctions and rewards speculative behavior."²⁷ Bidders in an auction rely heavily on available market and business data to establish their business plans and bidding strategies and to determine the value of the licenses at auction. A major part of these data is the Commission's auction

²⁴ BellSouth Comments at 25-27.

²⁵ See *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

²⁶ Fifteen commenters opposed the relief sought by the petitioners in this proceeding. The commenters included A and B block licensees, both successful and unsuccessful C block bidders, public interest organizations, and spectrum auction winners in services other than PCS.

²⁷ BellSouth Comments at 3-4.

payment rules which establish critical parameters for evaluating the licenses. Any change to these parameters forces auction participants to re-evaluate their bidding strategy to ensure that their bids remain competitive and prudent. Post-auction changes obviously deny the bidders the opportunity to adjust their strategies. Indeed, if the changes proposed in this proceeding had been made prior to the auction, the outcome of the entire process would have been quite different, with many bidders that dropped out of the bidding for a particular license, or the auction entirely, staying in longer and attaining licenses.

Numerous commenters, including C Block licensees, emphasize their reliance on the Commission's rules as established prior to the auction and note the unfairness and potential competitive harm from such post-auction changes.²⁸ BellSouth's analysis of General Wireless, Inc.'s ("GWI") request for a more than 60% reduction in the principal amount of its debt clearly illustrates the unfairness of such changes.²⁹ GWI won a number of hotly contested markets. The reduction in price that it now requests would drop its total payments well below a substantial number of legitimate bids by its competitors including, for example, three bids by NextWave in Atlanta, two bids by GO Communications in Miami, five bids by NextWave in San Francisco, and eight bids by Georgia Independent PCS in Athens, Georgia. To now give GWI these licenses for less than other bidders willingly would have paid would be arbitrary and patently unfair. Moreover, this analysis only looks at the substantial distortion of auction results from the reduction of one C Block licensee's debt. Numerous similar distortions likely will result in *every* instance where debt reduction

²⁸ See Nextel Comments at 8; Point Enterprises Comments at 3.; Cook Inlet Comments at 13. Also, included among these commenters are unsuccessful C Block bidders who likely would now be licensees if the rules at the auction were the same as those now proposed.

²⁹ See BellSouth Comments at Appendix. GWI claims that a reduction of the C Block bids to the average A/B Block bids is necessary because that price is currently the "fair market value" of the C Block licenses. GWI Comments at 1. This argument ignores the fact that the C Block bidders knew the prices bid for A and B Block licenses prior to the auction. Those prices should have been factored into the C Block bidders' bidding strategies at the auction.

is granted. Given the fact the Commission could scarcely justify granting debt relief to one, but not another C Block licensee, the resulting effects on the fairness and integrity of past auctions would be disastrous.³⁰

Post-auction changes, such as those requested by some commenters, also undermine the certainty and integrity of future auctions. If the Commission now alters the “fundamental bargain” established at the auctions to relieve some entrepreneur licensees of obligations that they voluntarily undertook, no bidder in the future will be able to rely on the certainty of the Commission’s rules in establishing its business plan and bidding strategy, hurting financing negotiations. Moreover, under-financed bidders will have no incentive to bid prudently, but will bid speculatively in reliance on Commission signals that it will adjust the debt of imprudent bidders rather than allow them to default as the Commission’s rules provide.³¹ Such signals will tell bidders that the auction will not be truly market driven³² thus preventing an auction licensing approach from ever functioning effectively and efficiently. The proposed changes will create only the fiction of a competitive bidding approach to spectrum licensing.

Finally, as Sprint PCS noted in its comments, the negative effects of the relief sought will not be confined to PCS auctions, but will have a ripple effect on all spectrum services licensed through competitive bidding.³³ Comments filed by companies such as Creative Airtime Services, a 900 MHz Specialized Mobile Radio licensee, and CONXUS

³⁰ An equally egregious example of the unfair nature of many of the various requests for relief is the suggestion by some commenters that the Commission eliminate any cross-default rules. *See e.g.*, BIA Capital Corp Comments at 4; Forum Comments (Panel 2) This suggestion would permit licensees to selectively default on less profitable licenses and retain the “better” licenses. Such “cherry-picking” would not only be unfair to other PCS licensees that must pay for or lose all of their licenses, but it would also greatly disserve consumers in those rural markets most likely to be sacrificed by financially burdened licensees.

³¹ *See* Cook Inlet Comments at 9-15.

³² Comcast Comments at 4.

³³ Sprint PCS Comments at 3.

Communications, Inc., a narrowband PCS licensee, requesting parallel regulatory treatment demonstrate this point.³⁴

Thus, the long-term damage to the overall auction process, as well as harm to the individual auction participants, far outweighs any benefit to be gained by certain individual licensees.³⁵

V. CONCLUSION

Strict enforcement of the Commission's existing auction rules and policies is the only approach that is sustainable, fair and consistent with federal law. The Commission may not alter the competitive playing field and destroy the integrity of its carefully considered spectrum auction procedures and rules by granting debt relief to imprudent C and F Block licensees. The only reasonable and sustainable result to be achieved in this proceeding is for

³⁴ See e.g. Creative Airtime Comments at 1; CONXUS Comments at 11.

³⁵ Based on the statements of commercial lenders participating in the Commission's July 1, 1997 Forum, it is far from certain that the various C Block licensees' proposals secure additional capital. Several lenders asserted at the Forum that only if the Commission immediately (1) instituted drastic reductions in the licensees debt load (as much as 80%), (2) took a subordinate lien position with respect to the money owed the federal government, (3) modified the ownership and attribution rules and (4) modified the installment payment schedules, would they be more willing to finance. Entrepreneurs Block licensees. Comments of Bear Stearns and Lehman Brothers representatives at the Forum, Panel 2. Moreover, in comments, Toronto Dominion cautioned that "the reduction in FCC obligations is a necessary first step to attract capital to C-block, but only a first step. The providers of such capital will still need to assess each operator's business plan, capital requirements and competitive position." Toronto Dominion Comments at 1-2.

the Commission to "stay its course" and continue to apply its auction rules and policies as originally promulgated.

Respectfully submitted,



For Sprint Spectrum L.P. d/b/a Sprint PCS

Jonathan M. Chambers
1801 K Street, N.W.
Suite M-112
Washington, D.C. 20006
(202) 835-3617

Cheryl A. Tritt
James A. Casey
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

For Sprint Corporation

Jay C. Keithley
1850 M Street, N.W.
Suite 1100
Washington, D.C. 20036
(202) 828-7453

Counsel for Sprint Spectrum L.P. d/b/a
Sprint PCS

For Cox Enterprises, Inc.

Alexandra M. Wilson
Cox Enterprises, Inc.
1320 19th Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 296-4933

July 8, 1997

CERTIFICATE OF SERVICE

I, Kimberly E. Thomas, do hereby certify that the foregoing **JOINT REPLY COMMENTS OF SPRINT SPECTRUM L.P. d/b/a SPRINT PCS, SPRINT CORPORATION** was hand delivered on this 8th day of July, to the following:

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Kathleen O'Brien-Ham
Chief
Auctions Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

Jerome Fowlkes
Deputy Chief
Auctions Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

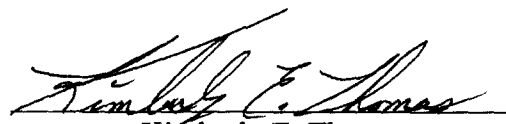
Sande Taxali
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

Josh Roland
Auctions Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

Rachel Kazan
Auctions & Industry Analysis Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

Dan Phythyon
Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Rosalind Allen
Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554


Kimberly E. Thomas